CASE NO. 83-5463

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM DUANE ELLEDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INTRODUCTORY STATEMENT

"R" followed by a Roman numeral and then an arabic number, indicates the page and volume of the record on appeal.

"S.R.I." followed by a arabic number refers to the supplemental record and page number.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT, the State of Florida, through undersigned counsel files this Response to the instant Petition for Writ of Certiorari to the Supreme Court of Florida as follows:

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts subject to the following additions and/or clarifications:

On July 11, or 12, 1977, after the remand of Petitioner's case for a new sentencing proceeding Mr. McCain (original trial counsel) was appointed to represent Petitioner on re-sentencing, which was scheduled for August 2, 1977 (R. IV. 9). On July 29, 1977 a motion for continuance was filed (S.R.I. 2) asserting that several defense witnesses were not available to testify the first week of August, 1977. The prosecution objected to the continuance on the basis that the testimony of

of the prospective defense witnesses regarding the effectiveness of capital punishment as a deterrent was not directly relevant to Petitioner's sentencing proceeding. Defense counsel proffered that:

> Basically, what the witnesses will testify to are the advantages or disadvantages of capital punishment; and would go into different aspects on the basis of statistics. (R. IV, 5-6).

Defense counsel made no mention of further psychological examinations and the motion for continuance was denied (R. IV, 10).

REASONS FOR DENYING THE WRIT

I. THERE WAS NO SUBSTANTIAL DEFICIENCY IN PETITIONER'S REPRESENTATION.

Petitioner pyramids one faulty premise upon another to arrive at the question posed in Petitioner's argument; that is, whether the "outcome determinative standard is proper for analyzing prejudice resulting from the denial of effective assistance of counsel." Before even addressing the stated issue, Respondent would like to review the historical chronology of the matter to demonstrate why the instant case is not even an appropriate vehicle for addressing the stated issue.

Aside from being Petitioner's original trial counsel, Mr. McCain was appointed to represent Petitioner for re-sentencing on July 11 or 12, 1977. At that time counsel was apprised that the re-sentencing was scheduled for August 2, 1977. The stated reason for the requested continuance was to gather sociological evidence as to the effect of the death penalty. Such evidence

is inadmissible. Shriner v. State, 386 So. 2d 525 (Fla. 1980); Scott v. State, 411 So. 2d 866 (Fla. 1982). It is evidence that does not relate to the character or record of the defendant, or the circumstances of the crime for which he was being sentenced. Lockett v. Ohio, 438 U.S. 586 (1978). Therefore, the denial of the continuance was proper.

The fact is, Petitioner was precluded from presenting nothing to the sentencing jury and the sentencing judge at his sentence hearing. Nonetheless, Petitioner argues as if, as long as he comes up with something "new," no matter how far down the road, he is entitled to a new sentencing hearing. Respondent is confident that death penalty law does not abrogate the doctrine of "finality," as Petitioner would desire. Were this the case, there would be no end whatsoever to a sentencing hearing, because defendants would always, in the future, come up with some new matter of mitigation. It is to be noted that Petitioner cites no law whatsoever that would indicate that the doctrine of "finality" is abrogated in death penalty cases.

The United States Supreme Court has recognized the doctrine of finality, in Wainwright v. Sykes, 433 U.S. 77 (1977) Petitioner had a full and fair sentencing hearing. He was precluded from presenting nothing. If, as he claims, new matters came to light, Florida provides him with the opportunity to file a Petition for Writ of Error Coram Nobis. Hallman v. State, 371 So. 2d 482 (Fla. 1979). He did this, and was

denied relief. It is to be noted that much of the background data which is alleged to be new evidence that could have been presented, was in fact presented through the testimony of Petitioner at the sentencing hearing. Thus, in many respects, it is essentially cumulative.

As to the allegedly new psychological data, Petitioner's attorney testified at the motion to vacate hearing that, had he presented such evidence, the prosecution would have come back on rebuttal and damaged any mitigating effect such evidence would have had by virtue or the presentation of the testimony of the three psychiatrists who had already examined Petitioner prior to his sentencing hearing (motion to vacate hearing, pages 42-44). Thus, while this issue teases the court, there is no merit to it.

Petitioner was not precluded from presenting any evidence. Much of the "new" evidence is cumulative. His trial attorney conceded that had such "new" evidence been presented, devastating rebuttal evidence was available for the prosecution to utilize. Petitioner had the opportunity to present the matter to the Florida Supreme Court by a Petition for Writ of Error Coram Nobis. That court denied relief, and its findings in so doing are entitled to a presumption of correctness. Marshall v. Lonberger, 32 Cr. L. 3027, USSC No. 81-420, opinion filed February 22, 1983. It cannot reasonably be concluded that there was anything more than a "possibility" that this "new" evidence would have been favorably considered by the sentencing tribunal, in light of the rebuttal evidence

that would have been presented.

But, in order to establish an ineffective counsel claim, the matter must create not only a possibility of prejudice, but it must have worked to the Petitioner's actual and substantial disadvantage. Washington v. Strickland, 693 F. 2d 1243 (5th Cir. 1982). Of course, Petitioner has not met his burden.

II. THE STATE COURTS APPLIED THE CORRECT STANDARD OF REVIEW FOR A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner challenges the appropriateness of reviewing a claim of ineffective assistance of counsel under the standard set forth in Knight v. State, 394 So. 2d 997, 1001 (Fla. 1981). Petitioner alleges he was denied effective assistance of counsel "due to his counsel's total inability to and failure to investigate Mr. Elledge's one plausible line of defense." However, as discussed earlier, counsel was familiar with the case having tried it, and was appointed to handle the re-sentencing some three weeks prior to the scheduled hearing. Further, his motion for continuance requested additional time to present sociological evidence which would have been inadmissible! Therefore, by denial of the continuance, Petitioner was precluded from presenting nothing![1]

It is significant to note that even if this Court were to reject the Knight test (based on United States v. DeCoster, 487 F. 2d 1196 (D.C. Cir. 1973) and adopt the test suggested in Washington v. Strickland, 693 F. 2d 1243 (5th Cir. 1982), Petitioner under the facts of this case would still not

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FOOTNOTE 1

1 It is noteworthy that the psychiatric report which Petitioner asserts is so compelling and significant was not prepared until late in 1982 or early in 1983. It presents largely cumulative evidence as Petitioner himself testified to much of the substance contained therein. To the extent that it presented any mitigating evidence, those contentions could have been rebutted with the testimony of the three psychiatrists who had already examined Petitioner.

meet the burden of showing actual and substantial disadvantage.

In Washington v. Strickland, the court held that to establish an ineffective counsel claim the Petitioner need only show "actual and substantial disadvantage to the course of his defense" without consideration as to whether the deficiency would have changed the outcome of the case. However, the State may still argue that in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel.

Under the rule espoused in Washington v. Strickland, supra, a defendant may overturn his conviction (accomplished by proof beyond reasonable doubt), by a mere preponderance of the evidence upon collateral claims. The State can then only rebut such a showing by proof beyond a reasonable doubt that a defendant's claims did not affect the outcome of the case.

However, the Knight and DeCoster view are constitutionally correct. The view Petitioner urges focuses solely on the omission itself. That is far too narrow a focus, because it improperly allocates the burden of proof and allows a defendant to overturn a conviction on the basis of a prima facie claim in a collateral matter. That is simply not a sufficient basis to overturn a conviction established by proof beyond a reasonable doubt.

The course of justice is far better served by a rule

of law requiring a defendant attacking a conviction on the basis of a collateral matter to show that the asserted omission or error was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceeding.

CONCLUSION

Under any view, Petitioner has failed to establish actual and substantial disadvantage as a result of the denial of the requested continuance. Moreover, the issue was properly reviewed by the state courts utilizing the standards set forth in Knight v. State, supra. As the issue regarding the validity of the "outcome determinative" test is not a necessary decision in this case and the test is already before this Court in Strickland v. Washington, ___ U.S. ___, 51 U.S. L.W. 3865 (June 6, 1983) (No. 82-1554) [granting certiorari in Washington v. Strickland, 693 F. 2d 1243 (5th Cir. 1982) (Unit B) (en banc), there exists no question in dire need of answers which cannot be resolved by ruling on the Washington v. Strickland case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MAX RUDMANN, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the Response To Petition For Writ Of Certiorari To The Supreme Court Of Florida, in the above-styled case to counsel for Petitioner by depositing same in the mail/courier addressed as follows:

Craig S. Barnard, Esquire
Assistant Public Defender
224 Datura Street, 13th Floor
West Palm Beach, Florida 33401

All parties required to be served have been served. Done this 20TH day of October, 1983.

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